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45736 7590 02/22/2011 Christopher M. Goff (27839) ARMSTRONG TEASDALE LLP 7700 Forsyth Boulevard Suite 1800 St. Louis, MO 63105				
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT L. POPP, DEBRA DURRANCE, PAUL
VANGOMPEL, MICHAEL T. MORMAN, and PAUL M. LINKER

Appeal 2009-009350
Application 10/036,573
Technology Center 3700

Before: JENNIFER D. BAHR, STEFAN STAICOVICI, and FRED A.
SILVERBERG, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

STATEMENT OF THE CASE

Robert L. Popp et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 3, 9, 28, 30, 31, 33-37, and 40-43. We have jurisdiction under 35 U.S.C. § 6(b).

THE INVENTION

The claims are directed to a mechanical fastening system for an absorbent article. Spec. 1:3-5. Claim 28, reproduced below, is illustrative of the claimed subject matter:

28. A mechanical fastening system for an article, said fastening system comprising:

a first fastening component comprising an oriented nonwoven loop material secured to a substrate, the oriented nonwoven loop material comprising a nonwoven web of fibers in which a greater number of fibers are oriented in a selected direction by the application of a force in the selected direction to extend the web; and

a second fastening component comprising a hook material, the oriented nonwoven loop material of the first fastening component being adapted for releasable connection with the hook material of the second fastening component.

REJECTIONS

1. Claims 3, 9, 28, 30, 31, 33-37, and 40-43 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Appellants regard as their invention. Ans. 3.²

² Ordinarily an objection is reviewable by petition under 37 C.F.R. § 1.181, and a rejection is appealable to the Board of Patent Appeals and Interferences. When the issue of new matter presented is the subject of both an objection and a rejection, the issue is appealable. To the extent that the

2. Claims 3, 9, 28, 30, 31, 33-37, and 40-43 stand rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the written description requirement. Ans. 4.³
3. Claims 3, 9, 28, 30, 31, 33-37, and 40-43 stand rejected under 35 U.S.C. § 102(b) as being anticipated by, or in the alternative, under 35 U.S.C. § 103(a) as being unpatentable over Noel (EP 0 289 198 A1, pub. Nov. 2, 1988). Ans. 5.
4. Claims 3, 9, 28, 30, 31, 33-37, and 40-43 stand rejected under 35 U.S.C. § 102(b) as being anticipated by, or in the alternative, under 35 U.S.C. § 103(a) as being unpatentable over Weirich (WO 97/25893, pub. Jul. 24, 1997). Ans. 7.

objection to the Specification identified as “Ground I” on page 10 of the Examiner’s Answer turns on the same issues as the rejection under 35 U.S.C. § 112, second paragraph, our decision with respect to the rejection is dispositive as to the corresponding objection. The objections to the drawings identified as “Ground G” and Ground H” do not appear to be related to any of the rejections, and thus are reviewable by petition under 37 C.F.R. § 1.181, and hence are not appealable. *See In re Berger*, 279 F.3d 975, 984 (Fed. Cir. 2002) (citing *In re Hengehold*, 440 F.2d 1395, 1403-04 (CCPA 1971) (stating that there are many kinds of decisions made by examiners that are not appealable to the Board when they are not directly connected with the merits of issues involving rejections of claims, and holding that “the kind of adverse decisions of examiners which are reviewable by the board must be those which relate, at least indirectly, to matters involving the rejection of claims”)); *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967) (holding that the refusal of an examiner to enter an amendment of claims is reviewable by petition under 37 C.F.R. § 1.181, and not by appeal to the Board).

³ To the extent that the objection to the Specification identified as “Ground J” on page 13 of the Examiner’s Answer turns on the same issues as the rejection under 35 U.S.C. § 112, first paragraph, our decision with respect to the rejection is dispositive as to the corresponding objection.

SUMMARY OF DECISION

We REVERSE.

OPINION

Rejection 1

Although the basis of the Examiner's rejection is not entirely clear, the rejection appears to be pointing to a lack of clarity in the language "oriented nonwoven loop material," and to a concern about the use of the present tense of the orienting limitation. *See* Ans. 3, 14; App. Br. 42, 43, 45 ("are oriented" in claims 28 and 33; "being oriented" in claims 40 and 42).

Accordingly, the first issue for our consideration is whether a person of ordinary skill in the art would have been able to ascertain the meaning of the claim language "oriented nonwoven loop material" in light of Appellants' Specification.

We find that Appellants' original Specification defined "[o]riented material" as "a material in which mechanical drawing of the material has resulted in alignment of the fibers constituting the material in a direction generally parallel to the direction of the applied force." Spec. 9:16-18. The original Specification also described the loop type fastener component as more preferably being "an oriented material comprising a nonwoven web of substantially continuous fibers." Spec. 23:21-23. We find that a person of ordinary skill in the art would have understood from these disclosures that "oriented nonwoven loop material" is a material having a nonwoven web of fibers which have been oriented or aligned by mechanical drawing of the material in a direction generally parallel to the direction of the applied mechanical drawing force. Appellants' amendment filed June 22, 2005, replacing the paragraph on page 9 of the Specification defining "[o]riented

material” with a paragraph defining “[o]riented nonwoven loop material” appears to be consistent with such an understanding. Additionally, the meaning of “oriented nonwoven loop material” to those of skill in the art attested to in the Declaration of Debra Durrance is consistent with such an understanding. Durrance Decl., para. 4. The Examiner has not rebutted that statement in the Durrance Declaration with evidence or cogent technical reasoning.

For the above reasons, we conclude that a person of ordinary skill in the art would have been able to ascertain the meaning of the claim language “oriented nonwoven loop material” in light of Appellants’ Specification. Therefore, this language does not render Appellants’ claims indefinite.

The second issue for our consideration is whether the use of the present tense in the recitations “are oriented . . . by the application of a force” (claims 28 and 33), “being oriented by drawing” (claim 40), and “being oriented by application of force” (claim 42) renders the claims unclear, ambiguous, or inconsistent with Appellants’ Specification.

We construe the present tense language in question as requiring that the web of the first fastening component be subjected to a force which acts to orient fibers of the web in the direction of the force. This is consistent with the description of the drawing process, which orients the fibers, and the attachment or direct extrusion of the substrate to or onto the “extended” nonwoven. Spec., para. bridging pages 27 and 28.⁴ The attachment or

⁴ We appreciate that the inserted definition of “[o]riented nonwoven loop material” on page 9 of the Specification, in Appellants’ amendment filed June 22, 2005, refers to “a direction of force previously applied to the web.” We understand this use of the term “previously” as alluding to the fact that the fibers are oriented generally parallel to the direction of the force after the

extrusion of the substrate to or onto the extended nonwoven suggests that the nonwoven is maintained in its extended state after such attachment to form the first fastening component, such that the web remains subject to the drawing force which orients or aligns the fibers of the web.

For the above reasons, the language in question is clear, unambiguous, and consistent with Appellants' Specification. Therefore, the language does not render the claims indefinite.

For the reasons discussed above, the Examiner has not established that the claims are indefinite. We do not sustain the rejection.

Rejection 2

The Examiner's articulation of the written description rejection, like the rejection under 35 U.S.C. § 112, second paragraph, lacks clarity. The Examiner's position appears to be that the claim terminology "oriented nonwoven loop material," as now defined in the Specification, and any "further" orienting of the oriented loop material lack support in the application as originally filed. *See* Ans. 4.

The Examiner has not cogently explained which aspect, or aspects, of the current definition of "oriented nonwoven loop material"⁵ lack written description support in the application as originally filed, nor has the Examiner explained why the current definition is inconsistent with the original disclosure. Further, for the reasons discussed above with respect to the indefiniteness rejection, it is not apparent to us that there is any inconsistency between the original description of the oriented loop material

force is applied, not as restricting the definition of "oriented nonwoven loop material" to a web from which the orienting force has been released.

⁵ *See* Spec., p. 9, Amendment filed June 22, 2005.

and the definition now contained in the Specification of “[o]riented nonwoven loop material.”

It is not entirely clear what the Examiner means by “further” orienting of the material. In any event, none of Appellants’ claims require multiple steps of orienting the material, or further orienting of the material beyond some lesser degree of orienting. Accordingly, the Examiner’s remarks provide no basis for us to sustain a rejection of the claims under 35 U.S.C. § 112, first paragraph, for failure to comply with the written description requirement.

We do not sustain the written description rejection.

Rejections 3 and 4

Claims 28 and 33 require, in relevant part, loop material comprising a web of nonwoven fibers which “are oriented . . . by the application of a force” (claims 28 and 33). Claims 40 and 42 require loop material formed by a web of nonwoven fibers, the fibers “being oriented by drawing” (claim 40) and “being oriented by application of force” (claim 42).

The Examiner’s rejections of the claims under 35 U.S.C. § 102(b) or, in the alternative, under 35 U.S.C. § 103(a) are grounded in part on the Examiner’s interpretation of these limitations as being product-by-process limitations. *See* Ans. 4-5, 6, 7-8, 20, 23. We do not agree with this interpretation. As explained above in discussing the rejection under 35 U.S.C. § 112, second paragraph, we construe the language in question as requiring that the web of the first fastening component be subjected to a force which acts to orient fibers of the web in the direction of the force. The Examiner has not articulated any findings directed to the web of either Noel or Weirich being subjected to a force which orients the filaments of Noel or the fibers of Weirich. Rather, the Examiner’s position appears to be that

because the filaments of Noel and the fibers of Weirich are positioned on the backing such that a majority of the filaments or fibers are aligned essentially parallel to the path of response (the direction in which the backing contracts), the end products of Noel and Weirich are the same as, or not patentably different from, the product of the claimed invention. As this finding does not fully address the limitations in question, we are constrained to reverse the Examiner's rejections.

We appreciate that both Noel and Weirich disclose that, while not preferred, the filaments could conceivably be positioned on the backing in a tensioned or unstable state. *See* Noel, col. 9, ll. 14-17; col. 12, l. 38 *et seq.*; Weirich, p. 15, ll. 15-17.⁶ Even assuming, however, that this constitutes disclosure of a non-preferred embodiment, there is no indication in either reference that the filaments would remain under tension after the backing has contracted to cause shirring of the filaments to form the loops, and hence the loop material, so as to satisfy the limitation in each of the independent claims that the web of fibers (filaments) of the loop material are subjected to a force which acts to orient the fibers of the web in the direction of the force.⁷

⁶ Placement of the filaments on the backing in a tensioned state is not preferred, because this would not provide maximum shirring of the filaments.

⁷ Noel and Weirich also both allude to shear forces on the fastening device in use. Noel, col. 15, ll. 33-41; Weirich, p. 19, ll. 9-15. We leave to the Examiner consideration of whether such shear forces would subject the web of the female fastening component to a force as called for in the claims which orients the fibers as called for in the claims, or whether it would have been obvious to position the fastening device in such a manner that the web of the female fastening component would be subjected to such a force in use.

DECISION

For the above reasons, the Examiner's decision is reversed.

REVERSED

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Christopher M. Goff (27839)
ARMSTRONG TEASDALE LLP
7700 Forsyth Boulevard
Suite 1800
St. Louis, MO 63105